IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No 2—Original

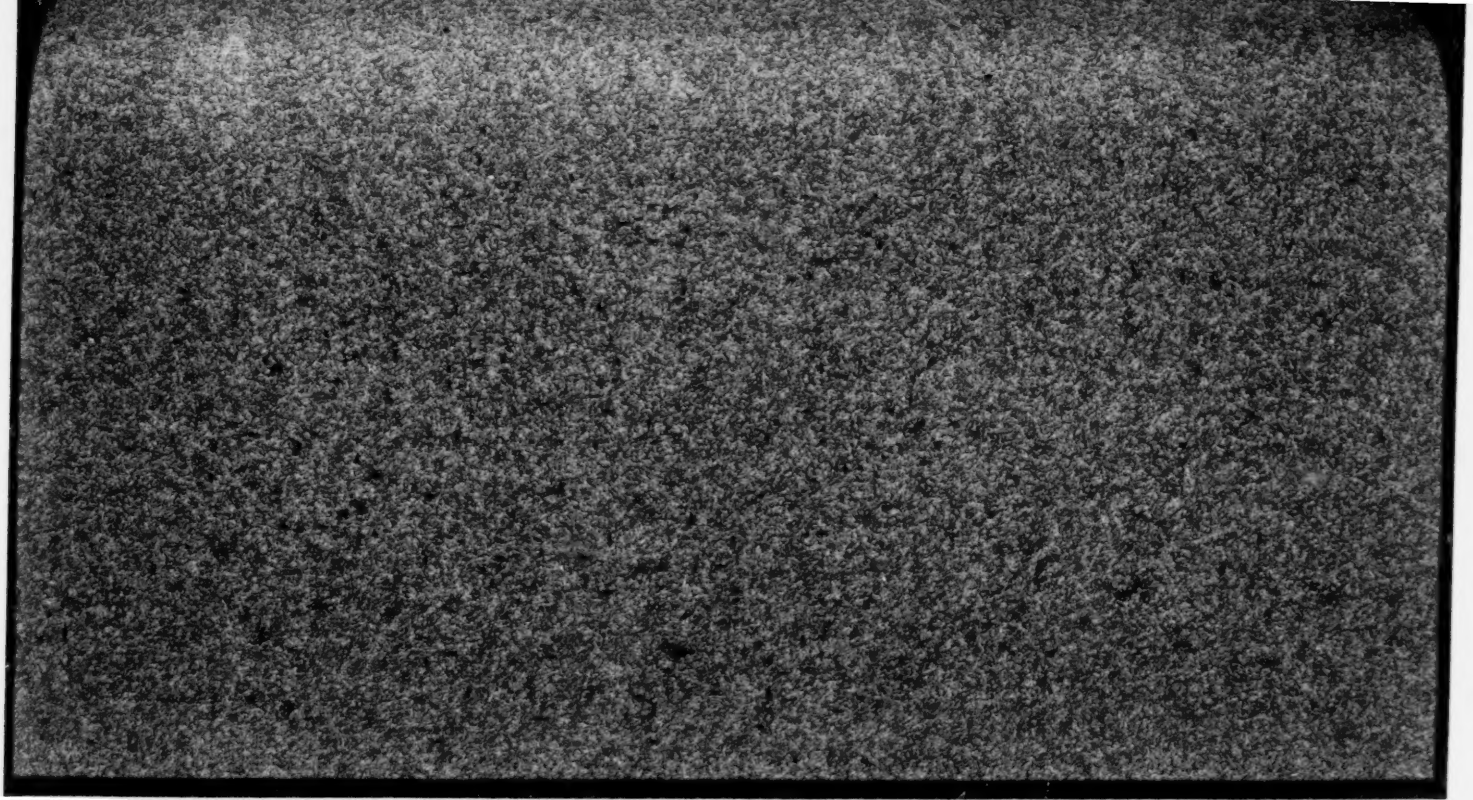
COMMONWEALTH OF VIRGINIA, COMPLAINANT,

vs.

STATE OF WEST VIRGINIA, DEFENDANT.

Motion by Bondholders to Appoint a Receiver

HOLMES CONRAD,
Attorney.



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Come now *O. L. Grosvenor, Adrian Iselin, Jr., executor of Charles Oliver O'Donnell; Lambert Suydam, Eutaw Savings Bank, Baltimore, Md.; The Johns Hopkins University, Mary Custis Lee, Robert E. Lee, administrator of estates of Mildred O. Lee and W. H. F. Lee; Trustees of Andover Theological Seminary, Safe Deposit and Trust Company, Baltimore, Md.; Trustees for Richard Twain, Thomas Twain, Isador Raynor, Nathaniel W. James, and Francis B. Harvey, The Catholic University of America, The Peabody Institute of the City of Baltimore,* who are bondholding creditors of the Commonwealth of Virginia, on behalf of themselves and of all other such bondholding creditors who are in the same class with them, whose interests are now, and from the institution of this suit have been, represented here by counsel, and move the court to appoint a receiver, with full power

to demand, receive and give acquittance for the money that may be paid over by the State of West Virginia, under the decrees of this court, in this cause.

For reasonable and sufficient grounds for this motion they assign the following:

1. There is now no hand duly authorized and empowered to receive this fund and hold the same safely, to abide the decrees of this court as to its ultimate application.

2. This court, having called this fund into existence, must, in order to a complete decree in this cause, provide for its collection and for its ultimate application to those persons who may be ascertained by future decrees in this cause to be entitled to receive it.

3. The Commonwealth of Virginia has by the decrees made in this cause fully accomplished the objects and attained the ends had in view in filing her bill of complaint here: (1) To fulfill the obligation imposed upon her by the certificates issued by her to the holders of her bonds, who received the new bonds of Virginia for two-thirds of their claim and the certificate for the one-third allotted to West Virginia, such certificates providing that Virginia, who had received the old bonds from the creditors, should "hold said bonds, so far as unfunded, in trust for the holder thereof or his assigns." (2) To secure her exoneration from liability on account of the bonds issued by her prior to 1861. The institution of this suit, its prosecution, and the final recovery from West Virginia, achieved the release of Virginia from the obligations of the trust and of her old bonds. She has no longer any interest in this cause. She will not receive one dollar of the amount to be paid by West Virginia under the decree of this court.

All of that amount, when paid, must be applied to the redemption of the certificates issued by Virginia to those

holders of her bonds who surrendered their bonds to Virginia and received these certificates.

The joint resolution of the Virginia legislature of March 6, 1894, appointing the Virginia Debt Commission, and relieving Virginia from any of the expense incident to this proceeding, provided in terms as follows, viz:

> "All expenses incurred by said Commission, * * * including reasonable compensation of the members thereof, shall be paid out of the proceeds of such settlement, or *by the holders of said certificates who are the beneficiaries of such settlement*, but without subjecting the State to any expense in this account" (Record, p. 49).

The act of the Virginia legislature of March 6, 1900, adopts this provision of the joint resolution.

It must be conceded by all that a receiver must be appointed by the court before the objects of this proceeding can be fully accomplished.

They further move the court that either *Brown Brothers and Company*, bankers, 59 Wall street, New York city, or *Thatcher M. Brown*, who is the member of that firm who has given special attention to this matter, be appointed the receiver.

Brown Brothers and Company are a partnership, and there may be objections to making a partnership firm receivers of a fund, because of the difficulty in holding the members to personal responsibility, but such objection cannot apply to the appointment of Mr. Thatcher M. Brown, a member of the firm. He can be required to give bond, with approved sureties, and his long and satisfactory experience in the matter of assembling these certificates does strongly commend him.

For grounds for this motion the following among others, may be assigned:

1. Brown Brothers & Co., from the inception of this movement to require from West Virginia the payment of her equitable proportion of the public debt of Virginia, prior to 1861, have been the chosen depositary of the certificates held by the bondholding creditors of Virginia. With them have been deposited these certificates which, by their intelligent and well-directed efforts, have been assembled from all parts of this country and from Europe.

2. As early as September 18, 1902, an agreement was entered into between several gentlemen, therein styled "The Committee," parties of the one part, and "such holders of the certificates herein mentioned as deposit hereunder." parties of the other part, wherein it was provided:

(*a*) The appointment of an advisory board, consisting of Thomas F. Bayard, W. Pinckney White, Edward J. Phelps, and George G. Williams, whose function should be to approve such plan of settlement as may be proposed by the committee representing the holders of the certificates. (*b*) Defining the functions of the committee, one of which was to appoint depositaries to receive the certificates and issue receipts therefor. (*c*) A proposal from the committee representing the holders of the certificates, to the Virginia Debt Commission, which was approved by the Attorney General of Virginia and accepted by the Virginia Debt Commission, wherein Brown Brothers & Co. are recognized as the depositary, chosen for the receipt of the certificate (Record, pp. 59-60). On December 3, 1902, the advisory board approved the plan of settlement of the West Virginia debt proposed by the committee (Record, pp. 67, 69). (See Exhibit 8 of the bill, Record, pp. 58-77).

3. In addition to the fact of the thorough knowledge of all the details of this matter, acquired by Brown Brothers & Co. during the eleven years of their connection with it, the high standing of this banking house throughout the

United States and Europe, would afford to the holders of the certificates throughout these countries the strongest assurance that their interests, in the hands of such a receiver, would be thoroughly protected.

The certificates deposited with Brown Brothers & Co. up to April 7, 1914, amount in their par value to $14,041,698.97.

If the appointment of the partnership banking firm of Brown Brothers & Co. as the receiver of the fund be considered by the court as inexpedient or undesirable then the appointment of Mr. Thatcher M. Brown as such receiver would be equally acceptable to the bondholding creditors, who are the holders of the certificates.

BONDHOLDING CREDITORS OF VIRGINIA,

By HOLMES CONRAD,

Their Attorney.

FILE COPY.

MAR 20 1914
JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 2, Original.

IN EQUITY.

COMMONWEALTH OF VIRGINIA

vs.

STATE OF WEST VIRGINIA.

BRIEF FOR BONDHOLDING CREDITORS.

HOLMES CONRAD,
SANFORD ROBINSON,
Counsel for Bondholding Creditors.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 2, Original.

IN EQUITY.

COMMONWEALTH OF VIRGINIA

vs.

STATE OF WEST VIRGINIA.

BRIEF FOR BONDHOLDING CREDITORS.

The defendant, State of West Virginia, moves the court for leave to file a supplemental answer to the bill of complaint of the Commonwealth of Virginia.

Two objects are said to be had in view in this motion, viz:

> 1. "To obtain leave to file a supplemental answer, presenting assets purchased with the common funds, prior to January 1, 1861, and appropriated thereafter by the State of Virginia to her exclusive use, &c."
>
> 2. "By her said supplemental answer, to present certain facts why West Virginia should not be charged with interest upon whatever proportion of the principal of said debt may be decreed against her."

Seven specific grounds are assigned, on which it is proposed to sustain the motion to file said supplemental answer (pages 6-8).

Before considering the grounds assigned for said motion, it may be well to refer to the conditions which have been indicated by this court in its former decisions, under which amendments to equity pleadings will be allowed.

In Hardin *vs.* Boyd, 113 U. S., 761, the court said:

> "In reference to amendments of equity pleadings, the courts have found it impracticable to lay down a rule that would govern all cases. Their allowance must, at every stage of the cause, rest in the discretion of the court; and that discretion must depend largely on the special circumstances of each case. It may be said, generally, that upon passing upon applications to amend, the ends of justice should never be sacrificed to mere form, or by too rigid adherence to technical rules of practice. Undoubtedly, great caution should be exercised *where the application comes after the litigation has continued for some time*, or *when the granting of it would cause serious inconvenience or expense to the opposite side.* And an amendment should rarely, if ever, be permitted where *it would materially change the very substance of the case made by the bill*, and *to which the parties have directed their proofs.*"

In Jones *vs.* Meehan, 175 U. S., 28, the defendant, upon notice, moved the court for leave to file a supplemental answer. The court said:

> "The question whether a supplemental answer should be allowed was a matter within the discretion of the court, largely depending upon the circumstances of the particular case. Hardin *vs.* Boyd, 110 U. S., 756; Smith *vs.* Babcock, 3 Sumner, 583. The reasons for denying the motion in this case are not stated in the record. They may have been the late stage of the case at which the motion was made, and a failure to satisfy the court that the facts now at-

tempted to be set up were not known, or at least were easily accessible to the defendant or his solicitor long before."

A recital of "the special circumstances of the case" presented here will serve to render apparent that each and all of the conditions indicated in the two cases cited above, as preventing an amendment of a pleading, exist conspicuously in this case. The supplemental answer proposed to be filed by West Virginia is now tendered, more than eight years after the bill was filed; nearly seven years after her original answer was filed; nearly six years after the order referring the cause to the master was made, and more than four years after the master had returned his report; more than three years after the cause had been fully argued and submitted on the whole case, including the master's report, and after a decree had been made, by which the amount of the principal of the debt had been ascertained and decided by the court to be due from West Virginia, and more than three months after the cause had again been argued and submitted and a reaffirmation made by the court of its previous decision on the — day of November, 1913.

The granting of the leave to file this supplemental answer is not only made "after the litigation has continued for some time," viz: for the space of over eight years, but the granting of it would "cause serious inconvenience and expense" in this: It would have the effect of remanding the case to the stage it occupied in 1907, when the defendant State filed her answer to the bill, and would render unavailing the enormous expenditure of time, labor, and money already made in the cause. It will render necessary another reference to the master to state, settle, and adjust accounts on a theory and plan essentially and materially different from that on which the parties, the counsel, and the master expended two years of arduous labor and research, and, indeed, entail an equal expenditure of time, labor, and money.

Already there has been expended in the prosecution of this cause more than $160,000, and the filing of this supplemental answer must inevitably cause an expenditure of nearly an equal amount. The proposed answer "would materially change the very substance of the case made by the bill, and to which the parties have directed their proofs." It would make, indeed, an entirely new and different case from that on which we have been so long engaged.

Through all these years of toil, from the filing of the bill on the 28th of February, 1906, to the filing of the master's report in March, 1910, the State of West Virginia has not been *inops consilii*. She has had the benefit of the ablest legal advice and assistance that the country afforded. Her own resources were great, but she went beyond her borders and employed Mr. John G. Carlisle and Mr. John C. Spooner. Prof. Chas. E. Hogg, of her State University, brought vast stores of learning and experience; Mr. Wesley Mollahan was not only a learned lawyer, but his knowledge of the history of his State, of all the details of her economic history and of financial vicissitudes were familiar to him; McClintic and Matthews, and the three Attorneys General, May, Conley, and, more recently, Lilly, all aided, and were much strengthened by the ability and learning of Ex-Governor W. O. Dawson. All these names appeared throughout the record of the case, while to the present motion the only surviving name is that of Prof. Chas. E. Hogg. The implication necessarily is that through all these years the distinguished lawyers who had afforded their services had greatly erred, either in knowledge, judgment, skill, or ability of some kind, and that they had failed to discover this mine of "unsunned gold" which it has fallen to the lot of the new commission and their new lawyers to unearth.

From November 16, 1908, to July 2, 1909, the master, the counsel on both sides, the expert accountants and their assistants employed by each side were in the city of Richmond, Virginia, engaged in critically exploring the financial

and the industrial records of Virginia contained in the offices of the auditor and of the treasurer of Virginia. From pages 210 to 1049 of this record appear in part the results of this investigation. Now, note! Every item of this alleged "newly discovered evidence" relied on as a ground for the motion to file this supplemental answer was contained in and obtained from the records of the office of the auditor and the treasurer of Virginia, which had been already explored and examined by the counsel and expert accountants of West Virginia between November, 1908, and July, 1909, as appears by this record. So that all this matter was not only "accessible to the defendant or her solicitor," but had been actually seen and considered by them five years before this motion is made. Not only that, but further: There appears on page 1026 of the record a statement by Mr. McClintic, of counsel for West Virginia, as to "all the cash receipts and disbursements of the State of Virginia from March 19, 1823, to January 1, 1861," and such statement itself appears from pages 1051 to 1065 of the record. This statement does not show what Virginia did after the war with the debris of the works of internal improvement therein referred to, but the records of the treasurer's office did show all that, and these records were before the agents and attorneys of West Virginia. None of Virginia's transactions as to this property were "done in a corner." All were matters of public record, and these records were open to and examined by West Virginia. All of the subjects recited in the present exhibits to the proposed answer appearing on pages 53 to 62 of the motion were conspicuous, physical objects, open and visible to all eyes, the railroads and the incorporated institutions, the very subjects on which the money represented by the public debt was expended. These all were notoriously and palpably within the territory of Virginia, were held by her, and some of them, it may be, disposed of by her. West Virginia knew all this; the whole world might have known it, as it knew of anything apparent to the senses. Why did not

West Virginia, in her answer to the bill of complaint or in her submitted scheme of matters to be inquired into by the master, then claim that these subjects formed matter on which to rest a claim of equitable offsets to Virginia's claim set out in her bill?

The court, in an opinion delivered by Chief Justice White last fall, admonished all parties that in April next this case would be finally heard as to interest. West Virginia waits until one month of the time fixed for the final hearing, and then appears and asks leave to reopen the case back to the date of the filing of her answer in October, 1907.

West Virginia asserts in the second ground assigned by her, page 16 of the proposed answer, that at the time of filing her original answer she "did not then know that the same (viz., the property, stocks and securities aforesaid) had been sold by Virginia." Why did she not know it? It was not done secretly, clandestinely, or in any irregular way. It was all done openly, publicly, under authority of acts of her legislature. She asserts that "the knowledge of these facts was peculiarly within the possession of the plaintiff, the State of Virginia." It would be an abuse of the patience of the court to attempt to meet this assertion.

West Virginia asserts in the third ground assigned by her, page 17, that after the joint conference of July 25, 1913, a subcommittee was appointed

> "for the purpose of making a complete examination into all the matters involved in this controversy" and "that during the investigations made by the subcommittee aforesaid, it discovered the matters and things heretofore and hereinafter alleged with respect to the value and disposition of the stocks, bonds and property owned by the Commonwealth of Virginia," &c.

This may be all quite true, but what does it avail? The present West Virginia commission and its subcommittee may have been in ignorance of all these things, but is it anywhere averred or does it anywhere appear that the former counsel

of West Virginia, who had been charged with the preparation and conduct of her defense to this bill, or her expert accountants, were ignorant of them? Does it not clearly appear that those agents and attorneys not only had means of knowing, but did actually know all about them?

It is needless and unprofitable to review here the other averments in this proposed answer. Can it in all fairness be said to be anything more than an ungrateful arraignment of the gentlemen—some now in their graves—who through long years of labor devoted themselves to the defense of the interests of West Virginia—an impeachment of their professional conduct, an angry, petulant complaint that the long-cherished hopes of West Virginia had been disappointed, and that it must be attributed to the fact that through neglect or ignorance of her counsel an undesired fate had befallen her?

The record of the case affords complete refutation of these unjust charges. Some of the members of this court can, of their personal knowledge, attest the fidelity, zeal, and ability of the counsel of West Virginia, who, from the filing of the bill to the return of the master's report, represented her in this cause.

On the Allowance of Interest.

The eighth ground assigned in the proposed answer, page 37, is that under section 8 of article 8 of the Constitution of West Virginia, under which she was admitted into the Union, "there is no promise or obligation upon the part of this defendant to pay any interest already accrued upon the said debt." The article referred to provides that "an equitable proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January, 1861, shall be assumed by this State," &c.

The view here presented—and it has been indicated elsewhere in the conduct of this case—appears to be, that because what West Virginia assumed in her Constitution was an

"equitable proportion" that therefore the debt of which such proportion was assumed must be an *equitable* and not a legal obligation.

The "public debt of the Commonwealth of Virginia," of which West Virginia assumed an equitable proportion, was a *legal* debt. It was constituted of and evidenced by bonds of the Commonwealth, each bearing interest from date. The interest, expressly promised on the face of the bonds, was as much a part of the public debt of Virginia as was the principal. West Virginia was as much the obligor of those bonds as was Virginia. Her name does not appear, because as yet she was not. But she formed an essential part of the Commonwealth, as did eastern Virginia. If all the counties that constituted the State of Virginia in 1863 save one had gone off and organized a new State, would those counties be heard to say that the public debt created before 1861 was no debt of theirs; that it was the debt of the one county that had retained the name of Virginia; that their name was not Virginia, but was West Virginia?

How the interest of this public debt can be separated from the principal and subjected to a different treatment is difficult to appreciate. It has been said that "it would be a severe result to capitalize charges for half a century." It certainly would, and yet if one, under the authority of law, gave his bond bearing compound interest—and that is what the writer understands to be "capitalizing charges"—and such a one evaded and avoided the payment of his debt for half a century, he surely would have no right to complain of the severity of a result that his own bad conduct had produced. This record shows, and it cannot be contradicted with safety, that since 1869 Virginia repeatedly sought a settlement with West Virginia of her just proportion of this debt.

This record shows—although it seems to have been overlooked in the consideration of this question—that Virginia, since January 1, 1861, has paid over seventy millions of dollars on account of this debt. She has made these pay-

ments up to 1905. West Virginia has not paid one dollar on account of her share of this debt (Record, p. 51).

If West Virginia is liable for any part of the principal of the debt—and this court has decided that she is liable for over $7,000,000 of it—then that is part of a debt that was due to the creditors fifty years ago. During that period that debt bore interest according to the express terms of the bonds evidencing the debt. Somebody is entitled to that interest, and if it is not allowed, then they will lose it. The party entitled to the interest is the party holding the bond. The party owing the interest must be the party owing the bond. This court has decided that West Virginia owes a certain proportion of the principal, which the court has ascertained. On what doctrines of equity, morals, or common honesty can she be exonerated from her liability to pay a corresponding proportion of the interest upon that principal is not apparent.

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